UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher.

Transcontinental Gas Pipe Line Corporation Docket Nos. RP03-13-003 and
RP01-236-013

ORDER ON TARIFF FILING AND REQUEST FOR CLARIFICATION

(Issued December 24, 2003)

1. In this order, we accept Transcontinental Gas Pipe Line Corporation's (Transco) proposed Sixth Revised Sheet No. 374O, Third Revised Sheet No. 374O.00 and First Revised Sheet No. 374O.01 to its FERC Gas Tariff, Third Revised Volume No. 1, to be effective June 5, 2003. We also grant Consolidated Edison Company of New York, Inc.'s, Orange and Rockland Utilities, Inc.'s, and Philadelphia Gas Works' (collectively, the Companies') request for clarification of the right of first refusal (ROFR) provisions in Transco's existing tariff, as discussed below. This order benefits the public because it secures rights afforded by the Commission's regulations and policies to firm shippers on Transco's system.

I. Background

2. In an order issued on November 27, 2002, the Commission found that Transco's tariff provisions concerning the ROFR were unjust and unreasonable and required Transco to revise its tariff to include just and reasonable ROFR provisions.[1] In the November 27 Order, the Commission found that Transco's ROFR tariff provisions limiting ROFR rights to the situation where the pipeline terminated the contract were directly contrary to Commission policy and regulations and, thus, were unjust and unreasonable. Pursuant to Section 5 of the Natural Gas Act (NGA),[2] the Commission ordered Transco to adopt just and reasonable tariff provisions permitting shippers to have and to exercise a ROFR when they terminate a contract and when the contract expires, as well as when the pipeline terminates the contract. The Commission also directed Transco to adopt just and reasonable tariff provisions permitting shippers to determine whether to request a continuation or a volumetric reduction in service after reviewing the best party bid. The Commission deferred resolution of conversion buyer ROFR issues to the proceedings in Docket Nos. RP01-245, et al.

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[1] Transcontinental Gas Pipe Line Corp., 101 FERC ¶ 61,267 (2002) (November 27 Order).

[2] 15 U.S.C. § 717d (2000).

3. In an order issued on June 5, 2003, the Commission denied Transco's request for rehearing of the November 27 Order and accepted Transco's December 27, 2002 compliance filing.[3] Specifically, the Commission accepted Transco's Second Revised Fourth Revised Sheet No. 374O and First Revised Sheet No. 374O.00 to its FERC Gas Tariff, Third Revised Volume No. 1 to be effective on June 5, 2003.

4. In the interim, on January 31, 2003, Transco filed tariff provisions in Docket No. RP01-236, et al., related to the implementation of Transco's 1 Line computer system. On March 19, 2003, the Commission accepted these tariff sheets, Substitute Fifth Revised Sheet No. 374O and Second Revised Sheet No. 374O.00, to be effective on April 1, 2003.[4] As a result, the tariff sheets approved in the June 5 Order were no longer current because they did not reflect the tariff revisions that became effective on April 1, 2003.

5. In the instant filing, Transco proposes (1) to incorporate the tariff language which became effective on April 1, 2003 into the tariff sheets accepted in the June 5 Order, (2) to move the tariff provisions that would appear on Sheet No. 374O.00 to Sheet No. 374O.01, and (3) to move into effect Seventh Revised Sheet No. 211 which the Commission previously accepted effective April 1, 2003.[5]

II. Notice of Filing and Pleadings

6. Notice of Transco's filing was published in the Federal Register, 68 Fed. Reg. 41,121 (2003), with comments, interventions and protests due on or before July 14, 2003.

7. The Companies filed a motion to intervene and request for clarification. Transco filed an answer.

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We accept Transco's answer because it has provided information that assisted us in our decision-making process.

III. Discussion

A. Tariff Filing

[3] Transcontinental Gas Pipe Line Corporation, 103 FERC ¶ 61,295 (2003) (June 5 Order).

[4] Transcontinental Gas Pipe Line Corp., 102 FERC ¶ 61,308 (2003).

[5] Transcontinental Gas Pipe Line Corp., 96 FERC ¶ 61,352 (2001) (September 2001 Order).

9. Transco proposes to incorporate tariff language from Substitute Fifth Revised Sheet No. 374O and Second Revised Sheet No. 374O.00 which became effective on April 1, 2003 into the tariff sheets accepted in the June 5 Order. Additionally, Transco seeks to move the tariff provisions that would appear on Sheet No. 374O.00 to Sheet No. 374O.01 because Transco's software program has difficulty recognizing Sheet No. 374O.00.

10. Finally, in order to correct an administrative oversight, Transco proposes to move into effect Seventh Revised Sheet No. 211 which the Commission previously accepted for filing by an order issued on September 27, 2001.[6] Transco inadvertently omitted this sheet from Appendix C of its January 31, 2003 compliance filing through which Transco moved various accepted tariff sheets into effect on April 1, 2003.

11. There are no protests to these proposed tariff changes and the request to move Seventh Revised Sheet No. 211 into effect. We accept Transco's proposed Sixth Revised Sheet No. 374O, Third Revised Sheet No. 374O.00 and First Revised Sheet No. 374O.01 to its FERC Gas Tariff, Third Revised Volume No. 1, to be effective June 5, 2003. Seventh Revised Sheet No. 211 is effective April 1, 2003.

B. Request for Clarification

1. Description of Pertinent Existing ROFR Provisions

12. The Companies request clarification of one aspect of Transco's ROFR provisions which Transco did not propose to change in the instant filing. Under Section 48.3 of Transco's General Terms and Conditions (GT&C), it may evaluate and determine the best third party bid for the capacity subject to the expiring contract by using one of two methods: (i) the highest net present value (NPV) of reservation charges or (ii) the highest rate bid, provided such bid meets Transco's minimum stated term. Section 48.4 of the GT&C gives the existing shipper the opportunity to match the best third party bid. The tariff does not set forth the method by which the existing shipper can match the best third party bid.

2. Arguments

13. The Companies are concerned about the manner in which Transco will implement the NPV bid evaluation method. They believe that, once Transco has chosen the best third party bid, it will require the existing shipper to individually match the rate and the term in that bid,

[6] September 2001 Order.

rather than simply matching the overall NPV of the third party bid. For example, if the third party bid was for 10 years at a deeply discounted rate, the existing shipper would have to match the 10 year term in the third party bid, even though it was willing to bid at a higher rate than the third party bid and such a higher rate, combined with a shorter term than in the third party bid, would match the overall NPV of the third party bid. The Companies argue that this interpretation, coupled with the Commission's determination that ROFR rights are given only to shippers who pay maximum rates, places an existing shipper in an untenable position if it desires to retain its ROFR. In the above example, the existing shipper would have to bid the maximum rate for the full 10 year term of the third party bid, even though such a bid would substantially exceed the NPV of the third party bid. Companies contend that this outcome is unjust and unreasonable.

14. The Companies argue that Section 48.4 should be consistent with the analogous provision in Texas Eastern's tariff because, in the June 5 Order, the Commission stated that it "directed Transco to adopt just and reasonable tariff provisions permitting shippers to determine whether to request a continuation or a volumetric reduction in service after reviewing the best party bid, consistent with Texas Eastern."[7] Under the Texas Eastern tariff, in order to match the best bid, an existing shipper must agree to a rate up to the maximum rate and contract term that provide the pipeline with at least the same NPV for an equivalent amount of capacity as the valid best bid.[8]

15. The Companies request clarification that, in order to preserve the opportunity to retain service from Transco on a long-term basis, they may "match" the "best bid" by offering a maximum rate contract with a term that results in a NPV equal to or greater than the NPV of the "best bid."

16. Transco responds that the Companies' concern is premature because the Companies have not attempted to exercise their ROFR. It also states that the concern would only arise if Transco were to agree to accept bids at less than the maximum rate and the rate included in the third party bid was less than the maximum rate.

17. Transco argues that the phrase "match the best bid" in Section 48.4 of the GT&C means that the buyer must at least match the terms of the best bid, including the rate and contract term of the best bid. It asserts that this interpretation is consistent with the Commission's ROFR policy, set forth in Order No. 636, which provides that, in order to continue receiving firm service, a buyer must agree to pay up to the maximum rate and match the length of the contract term offered by another buyer.[9]

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[7] Quoting Transcontinental Gas Pipe Line Corp., 103 FERC ¶ 61,295 at P 5 (citing Texas Eastern Transmission LP, 101 FERC ¶ 61,215 at P 16 (2002) (Texas Eastern)).

[8] Texas Eastern GT&C Section 3.13 (F) (Original Sheet No. 528).

[9] Citing Order No. 636, Pipeline Service Obligations and Revisions to Regulations

18. Transco claims that the Companies have misconstrued the Commission's reference to Texas Eastern in the November 27 and June 5 Orders. It asserts that the Commission's reference to Texas Eastern only relates to the Commission's policy that tariff provisions are unjust and unreasonable if they limit the ROFR to situations in which the pipeline gives notice to terminate a contract. It states that the Commission did not require Transco to model its ROFR provisions after Texas Eastern's provisions. Transco also argues that Texas Eastern's use of NPV to evaluate the matching of the best bid is more of an exception rather than the rule.

3. Commission Determination

19. The Commission finds that, if Transco chooses to use the NPV method to evaluate the best third party bid, it must use the same evaluation method to determine whether the existing shipper's bid matches the best third party bid. To apply a different evaluation methodology to the existing shipper than to the third party bidder would be unduly discriminatory.

20. In addition, the Commission has permitted pipelines to remove the cap on the maximum term an existing shipper must match, based on the findings that other regulatory constraints adequately limit the pipelines' ability, as well as any incentive, to induce lengthy contracts.[10] The Commission accordingly found that the fact that shippers may at times bid up contract length likely does not reflect an exercise of the pipeline's market power, but rather competition for scarce capacity. The Commission also found that, to the extent that a new customer does value the capacity sufficiently to make a long-term bid, requiring the existing shipper to match such a bid helps ensure that the capacity goes to the shipper that values it the most. These findings would be undercut if the pipeline were permitted to use one method to value the third party bids and then use a different method to determine whether the existing shipper had matched the best third party bid, with the result that an existing shipper desiring to retain its ROFR could have to make a bid with a value far in excess of the best third party bid. Under an NPV bid evaluation method, shippers may bid whichever combination of rate and term best represents the value they place on the capacity. If a pipeline permits the third parties to submit bids on this basis, it should also permit the existing shipper to do so. This conclusion is underscored by the Commission's policy that, if the existing shipper places an equal value on the capacity as the best third party bid, then the existing shipper is entitled to retain the capacity. However, Transco seeks to reserve the right to require an existing shipper who desires to retain its capacity with a ROFR to

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Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Wellhead Decontrol, FERC Regulation Preamble ¶ 30,930 at 30,448 (1992).

[10] Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services, 101 FERC ¶ 61,127 at P 11-22.

submit a bid that may be substantially in excess of the value of the third party bid. The Commission finds that this outcome is unjust and unreasonable.

21. Accordingly, pursuant to Section 5 of the NGA, the Commission requires Transco to modify Section 48.4 of its GT&C to provide that it will use the same bid evaluation methodology for determining whether the existing shipper has matched the best third party bid as it uses to choose the best third party bid. We require Transco, within 30 days of the date of this order, to file tariff sheets reflecting proposed tariff language which modifies its ROFR consistent with this finding.

The Commission orders:

(A) Transco's tariff filing is accepted, as discussed in the body of this order.

(B) The Companies' request for clarification is granted, as discussed in the body of this order.

(C) Within 30 days of the date of this order, Transco shall file revised tariff sheets, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.